History of Arbitration Practice and Law

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Long before laws were established, or courts were organized, or judges formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes. [1]

One of the earliest arbitrators was Solomon. In a book by Elkouri and Elkouri, How Arbitration Works (1960), the authors not only stated that Solomon was an arbitrator, but also noted that the procedure used by him was in many respects similar to that used by arbitrators today. An account of one of Solomon's arbitrations in the Old Testament is found in *I Kings*, chapter 3, verses 16–28, and reads:

1. Then came two women, that were harlots, unto the King, and stood before him.
2. And the one woman said, O my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house.
3. And it came to pass the third day after that I was delivered, that this woman was delivered also; and we were together; there was no stranger with us in the house, save we two in the house.
4. And this woman's child died in the night; because she overlaid it.
5. And she arose at midnight, and took my son from beside me, while thine handmaid slept, and laid it in her bosom, and laid her dead child in my bosom.
6. And when I arose in the morning to give my child suck, behold, it was dead; but when I considered it in the morning, behold, it was not my son, which I did bear.
7. And the other woman said, Nay, but the living is my son, and the dead is thy son. And this said, No; but the dead is thy son, and the living is my son. Thus they spake before the king.
8. Then said the king, The one saith, This is my son that liveth, and thy son is the dead; and the other saith, Nay; but thy son is the dead, and my son is the living.
9. And the king said, Bring me a sword. And they brought a sword

before the king.

10. And the king said, Divide the living child in two, and give half to the one, and half to the other.
11. Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it.
12. Then the king answered and said, Give her the living child, and in no wise slay it; she is the mother thereof.
13. And all Israel heard of the judgment which the king had judged; and they feared the king; for they saw that the wisdom of God was in him, to do judgment.

Out of the dim recesses of fable and mythology, it appears that upon Mt. Ida in Greece, the royal shepherd, Paris, was also called upon to deliver a famous arbitration award. The dispute concerned the competing claims of Juno, Pallas Athene, and Venus for the prize of beauty. All other means of settlement having failed, Paris, by agreement of the parties, decided the issue by arbitration.

If the course of arbitration is traced through the centuries, it will be found in the most primitive society, as well as in modern civilization. Commercial arbitration was known to the desert caravans in Marco Polo's time and was a common practice among Phoenician and Greek traders. Civil arbitration also flourished. In the Homeric period, chiefs and elders held more or less regular sittings, in places of assembly, to settle the disputes of all persons who chose to appear before them. In the middle of the sixth century B.C., Peisistratus, the Athenian tyrant, furthered his policy of keeping people out of the city by appointing justices to go on circuit throughout village communities. If they failed to effect a friendly settlement, they were authorized to make binding arbitration decisions.

International arbitration was also known to the ancient world, for many political disputes seem to have been settled in such a manner. In a controversy between Athens and Megara for the possession of the island of Salamis, about 600 B.C., the matter was referred to five Spartan judges who, by arbitration, allotted the island to Athens. A dispute between Corinth and Corcyra for the possession of Leucas (480 B.C.) was settled by Themistocles, as arbitrator. A boundary line in dispute between the Genoese and Viturians was settled by arbitration (117 B.C.), this decision having been recorded upon a bronze tablet unearthed near Genoa. There are also instances in which a third strong power compelled other powers to resort to arbitration. Sometimes the arbitrator was an individual like Themistocles, or an institution such as the Areopagus at Athens, or a state such as Athens.

Industrial controversy was also arbitrated in ancient times in such matters as master and servant relations, terms of employment, working conditions and wages. One of the first disputes submitted to the earliest known American arbitration tribunal, organized in 1786 by the Chamber of Commerce of New York, involved the wages of seamen.

It is important to recall these early uses of arbitration at this time when, in the midst of a rising tide of controversy, doubts arise. Arbitration is sometimes thought to be something new, untried, and hazardous to good public relations; or its organization seems to be detrimental to judicial institutions that seem older, but are in reality next-of-kin.

So soundly was arbitration initially conceived, and so generally was it applied to all kinds of controversy, that little change has taken place in its fundamental principles over the centuries. Despite efforts to narrow the early concept, or to put its practice in a legal strait jacket, arbitration remains the voluntary agreement of states or persons to submit their differences to judges of their own choice and to bind themselves in advance to accept the decisions of judges, so chosen, as final and binding. This natural right of self-regulation is a precious possession of a democratic society, for it embodies the principles of independence, selfreliance, equality, integrity, and responsibility, all of which are of inestimable value to any community.

It was inevitable that, in the absence of the organization of the idea, a period of confusion should have followed. The primitive idea that parties in dispute should choose a judge to render a final and binding decision on the merits of the controversy on the basis of proof presented by the parties, later became confused with other processes for the amicable settlement of disputes. However, these were not judicial, but bargaining processes, and were in the nature of mediation or conciliation. They were intended to effect compromises or to bring the viewpoints of the contestants into sufficient accord for them to settle the matter by themselves, rather than to administer justice. As the general term arbitration was rather indiscriminately applied to all of these processes, the effect was to lessen confidence in arbitration as a judicial process and to create misunderstanding as to its real purpose. One of the services which modern institutions of arbitration have rendered, aided by arbitration laws and the courts in interpreting these laws, has been the restoration of arbitration as a quasi-judicial process and the placing of conciliation and mediation in their proper perspective as bargaining processes without benefit of legal enforcement.

It was also inevitable, with the development of law and the establishment of courts and with the emergence of a profession of law, that arbitration, in a period of confusion, should have experienced a very considerable eclipse. As

disputants became more involved in litigation, they neglected to exercise their own powers of self-regulation. Because of the absence of any contemporaneously organized arbitration machinery or established rules of procedure, it became far easier for the parties in dispute to litigate than to arbitrate.

During this period of partial eclipse, the state arbitration laws did little to encourage arbitration. In theory, these laws were intended to confer the legal right to arbitration upon parties in dispute and to bring the courts to their aid in enforcing their arbitration agreements and awards. But both the common and early statutory laws imposed technical requirements which, if not observed, could render the agreement non-enforceable and the award void. For example, failure to file a submission agreement with the court or to have it made an order of the court, could have this effect. Other requirements, such as beginning suit before arbitration, made it necessary for parties in dispute to conform to various court regulations before they could proceed with their arbitration. Under these restrictions, arbitration inevitably fell into disuse, except in instances where parties were content to rely upon good faith, without recourse to legal machinery.

But none of these early handicaps explains the obscure and humble role played by arbitration in early American history; or why a people so bent upon freedom, self-discipline, and self-regulation should have ignored arbitration, which so embodies these qualities.

Except for its adoption by a few trade and commercial organizations, its use in the settlement of some differences over colonial rights and boundaries, and its role in the collection of debts, arbitration does not appear to have struck deep roots in early American life. It did not become an integral part of the early social and economic development of the country or a recognized institution of any consequence. Its impact was negligible upon the growth of justice in the country.

Arbitration literature of this early period is exceedingly sparse, and inquirers are, therefore, handicapped in examining the somewhat vague course taken by arbitration and the cause of its inaction. Such record as exists appears generally in court decisions, rendered in the course of controversy over the process of arbitration rather than in its normal usage by individuals and trade groups.

It is probable that this situation was due somewhat to the attitude of Americans toward discord and dispute. Both were complacently accepted phenomena, to be settled either by force or by litigation. America was a rich country, full of adventure, and could afford a considerable volume of

disputes at a high cost of settlement. As disputes were regarded as an inevitable and healthful process in the development of a new country, the prospect that they might sometime become a menace to society was not of immediate concern. Since in trade and commerce the margin of profit was then sufficient to allow for a very considerable waste, the attribute of economy was not an attraction to arbitration. In industrial relations, parity of power between employers and employees had not yet reached the point of encouraging arbitration.

It is also probable that it was this early American attitude toward disputes that failed to give arbitration any outstanding advocates. Without such leadership, so conspicuous in other advancing fields of endeavor, arbitration could not present an effective challenge to the fast-growing volume of disputes.

Prior to World War I America had its great judges, scientists, authors, artists, and other leaders, but arbitration could claim no such distinction. Arbitration appeared to have been a homeless, friendless wanderer among men and nations, remembered only in periods of acute distress when it was often too late for it to be of service.

Although arbitration had found a foothold in chambers of commerce as early as 1768 in New York, 1794 in New Haven, and 1801 in Philadelphia, the example set had not resulted in its general acceptance by other chambers of commerce; and even when established it was not generally used, because little effort was made to educate the public in its use. Of the thousands of trade associations in operation, only a comparatively small number of them knew about or used arbitration. Financial and commodity exchanges that had found arbitration practical in New York achieved only a limited application in similar exchanges throughout the country. Collective bargaining agreements had not come into general use, although a few pioneer organizations, such as the building trades, printing, and clothing industries had quite generally used arbitration and had blazed a new trail.

The only clear record of development in arbitration was still to be found in the court decisions interpreting such common law and statutory provisions as were applicable to arbitration. Through these decisions certain principles and policies of immense significance to the future development of arbitration had been established. But they offered no clear view of the normal history, development, or progress of arbitration in the United States or of its relation to public welfare; nor did they portray arbitration as an institution having a definite impact upon the economic life of the country.

The scant historical pattern as traced through early American history was,

therefore, tolerance of the inevitability of disputes, indifference to their cost, acceptance of a prodigious amount of litigation, and an almost total absence of organization that would make arbitration readily accessible to the people. Education in the knowledge or use of arbitration was unheard of; nor was there source material available; nor had teachers thought of instruction in the subject.

Generally speaking, unawareness was the phenomenon of this early period. Americans were unaware of the contribution that arbitration could make to their national economy or of the service that arbitration could render in the advancement of goodwill, good faith, confidence and co-operation in commercial relations. They were also unaware of the latent power of arbitration for advancing international peace and security through world trade. The era had not yet arrived for resumption by the individual of the exercise of his natural right of self-regulation in matters of dispute, a right he had been steadily relegating to the rigid processes of law.

1. See generally, Keller, American Arbitration: Its History, Functions and Achievements (1948).

The pattern Changes in America

The new era in American arbitration began in 1920. It was characterized by the modernizing of arbitration law, systematic planning, organization of machinery, cultivation of a spirit of arbitration, and construction of foundations of knowledge. Its incentive came from World War I with the resolve to avoid future wars insofar as the settlement or control of disputes through arbitration could accomplish that end.

In so changing the historical pattern, Americans had before them some invaluable lessons in several previous undertakings. One of these lessons arose out of the Conferences of 1899 and 1907, which had laboriously established the Permanent Court of Arbitration at the Hague. The Conventions there adopted carefully defined processes of inquiry, mediation, and arbitration, set up rules of procedure for each process, and provided machinery for their administration. High hopes were held that this Court might prove an instrumentality for the prevention of future wars. But one fundamental omission was made. No provision was made for cultivating the spirit of arbitration or for educating either governments or their people in the knowledge and use of arbitration. So, the first World War came without the Court's having functioned in the settlement of major issues.

A similar mistake was made in the next great international adventure when the League of Nations was organized. It also provided for arbitration and committed its members in principle. It went further and established the first Permanent Court of International Justice, with ample machinery for its operation. But the League also failed to cultivate the spirit of arbitration or to teach nations or peoples its use either in their home affairs or in international relations. So, the second World War came, without the League or the Court having been able to settle differences among nations.

In the meantime a third experiment had been tried. Over a period of half a century, the American Republics, acting through a central organization known as the Pan American Union, were pursuing a different course. They were binding the Republics together in peace through a network of conventions, agreements, arrangements, and undertakings which established the central principle of settlement of disputes through amicable processes, including arbitration. Not only were these agreements consummated, but the

Pan American Union, through many different educational and scientific undertakings, unceasingly cultivated the spirit of arbitration and educated governments in the use of its pacific processes of settlement. This experiment held these Republics together under the stress of international war and the strain of threatened wars among themselves. This experiment furnished both the inspiration and the hope for a new era in American arbitration and for a change in the historical pattern.

The event that was to precipitate this change in pattern, like so many inconspicuous events that later prove momentous, gave no indication of its significance either to American life or to international peace and security. It was, on the contrary, the rather drab event of enacting a modern arbitration law in 1920 in the State of New York-the first of its kind in the United States. This law possessed the unusual features of looking forward instead of backward, and of enabling parties in dispute to control future disputes as well as to settle existing disputes. Although similar features had existed in British and Scottish laws for many generations, it proved to be a revolutionary step in the Americas, as it had not been in other countries.

Under the provisions of this new law, agreements to submit to arbitration future disputes arising out of a contract containing such agreements were made legally valid, enforceable, and irrevocable. Before this, only existing disputes had enjoyed such legal protection. Furthermore, the new law closed the courts to parties to arbitration agreements and it brought to the aid of the parties the powers of the courts in enforcing agreements and awards, by authorizing them to appoint arbitrators, or otherwise expedite arbitration, upon default of one of the parties.

Little was it dreamed in 1920 that under this and subsequent laws of a similar nature arbitration clauses in contracts would become the foundation stones of wide-flung systems of arbitration.

The enactment of this new law might, however, have proved no more significant in the United States than had similar laws in other countries, but for the fact that it led to the organization of the first permanent, independent institution of arbitration.

This new institution was organized in 1922 as the Arbitration Society of America. It offered arbitration a normal, active career of its own, with its own headquarters and personnel. It made possible the organization of systems of tribunals administered by an independent and responsible institution. It freed arbitration from commodity and geographical limitations to serve all of the people all of the time.

This change in pattern from indifference and casualness to scientific organization was effected not only by a new type of organization, but by the adoption of different methods for the advancement of arbitration. Under a distinguished leadership, this institution put on an educational campaign that carried arbitration to the people in a new way throughout the country.

Under this stimulus, arbitration made front page headlines in the press. It went out to luncheon and to dinner; receptions were held in its honor, and forums were dedicated to its exposition. It became the subject of conference, debate, and instruction. It frequented exclusive clubs and found its way into homes, churches, schools, and theatres. It passed into the exclusive portals of law offices, banks, and corporation board rooms. It came out of dry law books, where only the difficulties were recorded, and found a place in general, as well as special periodicals.

Nowhere in the world had arbitration ever had such an audience as when sixty members of the New York Judiciary sat down to dinner in its honor, followed by a conference at which more than four hundred business and professional men discussed its future.

But other experiments were to come. One morning the *Arbitration News* made its appearance, and the first arbitration publication was born. Arbitration had become news, for the things that were done and said about it were spotlighted, and its leaders became known to the public. Along with *Arbitration News*, "*Learn to Arbitrate*" became the slogan of the new Arbitration Society and a stamp bearing this slogan made its appearance.

A highlight of the Society's endeavor to make arbitration better known occurred in 1923, when May 7–12 was made "Arbitration Week." Charles L. Bernheimer, Chairman of the Arbitration Committee of the Chamber of Commerce of the State of New York, arranged a program in which more than fifty trade and commercial organizations participated. The educational work carried on during that week marked a sharp departure from the traditional treatment of arbitration.

During its first year and a half, 1922 and part of 1923, the Society recorded the distribution of 158,000 pieces of literature at 1,200 meetings, conferences, or gatherings where arbitration was discussed. It received 600 applications for information or for the settlement of disputes. Furthermore, during the Society's lifetime, from 1922–26, there were enacted modern arbitration laws in both Massachusetts and New Jersey. The Society was also instrumental in effecting the enactment by the United States Congress of the Arbitration Law in 1925, applicable to interstate commerce and foreign trade transactions.

The influence of the Society spread in many directions. Trade and commercial organizations began to furnish their own facilities and services for their own groups and to participate in making this broader pattern of arbitration a reality. For example, in 1923 Will H. Hays, soon to become a director of the Society, established an arbitration system in the Film Boards of Trade for the motion picture industry. A report on this system, set forth in the *Congressional Record*, was also instrumental in furthering the enactment of the United States Arbitration Act of 1925.

Not less significant was the new leadership developed by the Society. It brought business men, lawyers, economists, teachers, and professional men together in a common endeavor. It found staunch and distinguished advocates to champion the cause of arbitration, not solely as judges in disputes, but for its general advancement. These advocates changed the passive role of arbitration to one of action and gave it a new prestige. No longer was it submerged in contracts or limited to resolutions and endorsements, nor were its failures publicized in law books. On the contrary, arbitration sought the people; it besieged their conscience to recognize its usefulness in the control of future disputes.

During the four years of its existence, from 1922–26, this new Society substantially changed the pattern of arbitration. It brought arbitration out of its austere judicial area into the limelight as an instrumentality which people themselves could use generally for the voluntary settlement of many kinds of differences. It made arbitration procedures readily accessible to the people through the establishment and operation of a commercial arbitration tribunal. It created a new leadership through panels of arbitrators and trade groups. It directed public attention to a hitherto drab and obscure subject. It flung a challenge of self-regulation to private enterprise. It opened the eyes of lawyers to a new practice in arbitration tribunals. It envisioned the dawn of a new profession by starting a panel of arbitrators and beginning their education. It brought arbitration to the people in a simple yet dramatic way and stimulated their faith in this age-old method of solving differences and maintaining friendships. It introduced into the American way of life a new institution for building and maintaining good faith, good-will, and confidence in human relations.

All of this was largely the contribution of a single leader, Moses H. Grossman, and the devoted group of men who comprised the Society's first Board of Directors and their associates of the bar, bench, business, education, and the professions. The society, therefore, was the representative of many groups of people from all walks of life, participating in a new concept of arbitration.

Having experienced this change from indifference to approval, from a passive

role to action, and from obscurity to public acclaim, arbitration could never again become a forgotten way of American life and was destined to find its way eventually upon a broad international highway.

The American Arbitration Association Arrives in 1926

The young and lusty Arbitration Society of America, with its new ideas and challenging program, was not destined to see the full realization of its national plans or to have any part in their international application. Its activities proved too disturbing of the old concepts to go unchallenged. In 1925, when the Society was but three years old, the challenge was issued by another new organization, sponsored by the Chamber of Commerce of the State of New York. This new organization was the Arbitration Foundation, headed by Charles L. Bernheimer, then Chairman of the Arbitration Committee of the New York Chamber of Commerce.

In 1926 the society and the foundation both passed out of existence in name and function when the present American Arbitration Association was created. Lawyers had been outstanding in building the old Society and continued their interest and cooperation with the new Association. Judges and lawyers served on the AAA board of directors and also on its various committees. They became members of the association. They strengthened its organizations and determined many of the policies that were eventually incorporated in the procedures for its tribunals. They served as arbitrators or appeared in tribunals on behalf of clients. They put arbitration clauses in contracts and were instrumental in securing better arbitration laws in the various states. They wrote for law reviews articles on arbitration, lectured in law schools, and conducted conferences and debates in law associations. They also functioned actively in the new Association through a special committee of lawyers and an arbitration law committee. The arbitration committee, acting under the Association rules, has always been composed of lawyers. Later, the panel of arbitrators for the accident claims' tribunal was also composed entirely of lawyers. To business men, engineers, lawyers, accountants, credit men, purchasing agents, and countless others, the association owes its vision and enthusiasm.

While our concern here is history, it would not seem inappropriate to supply some notion of what the AAA is now doing. This can be gleaned from even a casual examination of its recent issues of "*Arbitration News*," the official

organ of the association. In the September 1968 issue there appeared the headline, “Center for Dispute Settlement Established by AAA for Easing of Urban Crisis Through Arbitration.” It stated that the association proposed to develop impartial machinery, and to train arbitrators within local communities, and to deal with such matters as landlord-tenant disputes, urban renewal conflicts, complaints against welfare agency procedure, dissension between merchants and consumers, and “confrontations by civil rights units.” Other headlines from the same issue were: “Right-of-way Dispute in Michigan Goes to Arbitration Before AAA Panel”; “Eminent Domain Arbitration Rules Set for Utilities, Public Agencies, and Private Property Owners”; “Alaska and Virginia Join List of States Having Improved Arbitration Laws.” From the October 1968 issue of “*Arbitration News*” came still further headlines such as “State Department Urges Senate Ratify UN Convention on International Commercial Arbitration”; “National Corporations and States May Arbitrate Tax Controversies Under Multistate Tax Compact”; “AAA Manager in Boston Doubles as Mediator and Pilot to Poll Telephone Strikers on Contract”; “Arbitration Seminars for Labor and Management Representatives Announced for Fall and Winter.” Finally, taking notice of the last national presidential election, was the headline, “Major Parties Sign Code of Fair Campaign Practices and Agree to Arbitrate Claims of Violations,” followed by a news story indicating that the fair campaign practices code had been signed by both the Chairman of the Democratic National Committee and by his Republican counterpart. It therefore can be seen that arbitration is today, as it was in yesteryears, a dynamic institution for the peaceful settlement of discord, differences, and disputes.

About Author

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